## Gunalan a/l Visuanathan v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 41–29 OF 2007
YEOH WEE SIAM JC
26 OCTOBER 2009

*Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged under ss 392/397 of the Penal Code ('Code') — Whether benefit of failure by prosecution to invoke s 34 of the Code to be given to appellant — Whether prosecution only to prove offence of robbery under s 392 against accused — Whether commission of theft by accused proven — Whether no reasonable doubt raised by defence*

*Criminal Procedure — Charge — Defective charge — Appeal against — Accused charged under ss 392/397 of the Penal Code ('Code') — Whether charge defective for failure to include s 34 of the Code — Whether reference to s 397 of the Code in charge against accused rendered charge defective — Whether defect in charge occasioned failure of justice — Whether irregularity curable under s 422 of the Criminal Procedure Code*

*Criminal Procedure — Sentence — Robbery — Principles of sentencing*

*Evidence — Documentary evidence — Police report — Admissibility — Whether police report in Malay language admissible since maker did not know Malay language*

The appellant was charged under ss 392/397 of the Penal Code ('Code') for committing robbery on one Tamil Mani ('SP1') by snatching his bag while armed with a knife. According to SP1, he was going to the bank on a motorcycle. When he stopped his motorcycle, the appellant and another person came towards SP1 and asked SP1 in Bahasa Melayu 'You punya nama Tamil Mani ke?', and 'You punya motor 8306 ke?'. After that, the appellant's friend pointed a knife and the appellant pulled the bag from SP1. SP1 chased the appellant, detained him and got back his bag. The appellant was arrested by the police whilst the appellant's friend escaped. The appellant's defence was that a person called Ravi had asked the appellant for help to collect a debt from one Tamil Mani; they saw SP1 riding a motorcycle, the appellant stopped the motorcycle and asked SP1 whether he was Tamil Mani; when

SP1 admitted that he was Tamil Mani, Ravi pulled SP1's bag and SP1 fell; SP1 then chased Ravi with the appellant running behind SP1; the appellant managed to retrieve the bag from Ravi but was accused by SP1 as the one who stole his bag. The defence also contended that the police report (P1) made by SP1 was not true because SP1 did not understand the Malay language. The magistrate rejected the defence as a mere fabrication and held that the prosecution had established a prima facie case. The appellant was sentenced to eight months imprisonment. The appellant appealed against his conviction and sentence, arguing, inter alia that: (i) the prosecution failed to include in the charge the provision of s 34 of the Code even though the appellant was charged with another person still at large; and (ii) s 397 of the Code is an offence which is separate and distinct from the offence under s 392 of the Code.

**Held**, dismissing the appeal against conviction and allowing the appeal against sentence:

(1) The charge was defective for failure to include s 34 of the Code. Such irregularity is not fatal but is curable under s 422 of the Criminal Procedure Code ('CPC'). However, since the evidence showed that the person at large was the one who pointed the knife at SP1, and not the appellant, that fact should not be held against the appellant. The benefit of the failure by the prosecution to state s 34 of the Code should be given to the appellant. Therefore, the appellant should be treated as if he had been charged and tried separately from the person still at large under s 170 of the CPC. That being the case, the prosecution had the burden of proving the ingredients of the offence against the appellant without relying on the evidence that in the course of the commission of the offence, the person at large pointed a knife at SP1 (see para 24).

(2) The charge, by the reference to s 392/397 of the Code, was also defective. However, such defect is not fatal. The prosecution had to prove the offence of robbery under s 390 of the Code which is punishable under s 392 and/or s 397 of the Code. Since the appellant did not use a knife or any weapon during the commission of the offence, the punishment section that was applicable was s 392 and not s 397 of the Code. The reference to s 397 of the Code in the charge had not occasioned a failure of justice. So long as the appellant was not prejudiced and knew the type of offence that he was charged for, reference to s 397 of the Code in the charge did not vitiate the proceedings (see para 25).

(3) Since only s 392 of the Code was applicable to the charge against the appellant, the only ingredient to be proved for the offence against the appellant is that an act of robbery was committed ie theft was

committed under s 390 of the Code. The prosecution was able to prove the above ingredient of the offence. The defence had not raised any reasonable doubt on the prosecution case to rebut it (see paras 28–29 & 45).

(4) The contents of P1 could be accepted because its contents were similar to SP1's testimony in court. SP1's employer, SP3, was also called as a witness and he confirmed that he only assisted SP1 to make the police report because SP1 did not know the Malay language (see para 48).

(5) The appellant was not armed and did not cause hurt at the time of commission of the offence. Nevertheless, the court had to take judicial notice of the fact that bag-snatching by snatch thieves or robbers was rampant in this country, particularly in the Klang Valley, including Petaling Jaya where the offence was committed. However, since the magistrate erred in fact and law in considering the fact the person at large had used a knife when the appellant committed the offence, the eight months imprisonment was inappropriate. The eight months imprisonment sentence was therefore set aside and substituted with a sentence of six months imprisonment (see paras 53–55).

**[Bahasa Malaysia summary**

Perayu dituduh di bawah ss 392/397 Kanun Keseksaan ('Kanun') atas kesalahan melakukan rompakan ke atas Tamil Mani ('SP1') dengan meragut begnya bersenjatakan sebilah pisau. Menurut SP1, dia sedang menuju ke bank menaiki motorsikal. Apabila dia berhenti, perayu dan seorang lagi menghampirinya dan bertanya dalam Bahasa Melayu, 'You punya nama Tamil Mani ke?', dan 'You punya motor 8306 ke?'. Kemudiannya, kawan perayu mengacukan pisau ke arahnya dan perayu menarik beg tersebut daripada SP1. SP1 mengejar perayu, menangkapnya dan mengambil semula begnya. Perayu ditangkap oleh pihak polis tetapi kawannya terlepas. Pembelaan perayu adalah seseorang yang bernama Ravi telah meminta perayu menolongnya mengutip hutang daripada Tamil Mani; mereka nampak SP1 menunggang motorsikal, perayu menghentikan motorsikal tersebut dan bertanya adakah dia Tamil Mani; apabila SP1 mengaku, Ravi menarik beg SP1 dan dia jatuh; SP1 kemudiannya mengejar Ravi dan perayu berlari di belakang SP1; perayu berjaya mengambil beg tersebut daripada Ravi tetapi dituduh oleh SP1 mencuri beg tersebut. Pihak pembelaan juga berhujah bahawa laporan polis (P1) yang dibuat oleh SP1 tidak benar kerana SP1 tidak faham Bahasa Melayu. Majistret menolak pembelaan tersebut sebagai rekaan semata-mata dan memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie. Perayu dihukum penjara selama lapan bulan. Perayu merayu terhadap sabitan dan hukumannya, menyatakan, antara lain, bahawa: (i) pihak pendakwaan gagal memasukkan dalam pertuduhan

perutukan s 34 Kanun walaupun perayu dituduh dengan seorang lagi yang masih bebas; dan (ii) s 397 Kanun merupakan kesalahan yang berlainan dan berbeza dengan kesalahan di bawah s 392 Kanun.

**Diputuskan**, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap hukuman:

(1) Pertuduhan tersebut adalah cacat kerana gagal memasukkan s 34 Kanun. Kecacatan tersebut tidaklah memudaratkan tetapi boleh diperbetulkan di bawah s 422 Kanun Prosedur Jenayah ('KPJ'). Walau bagaimanapun, memandangkan keterangan menunjukkan bahawa orang yang masih bebas itu adalah orang yang mengacu pisau ke arah SP1, dan bukannya perayu, fakta tersebut tidak harus digunakan untuk menentang perayu. Kegagalan pihak pendakwaan menyatakan s 34 Kanun harus memberi kelebihan kepada perayu. Oleh itu, perayu seharusnya dianggap seperti dia telah dituduh dan dibicarakan secara berasingan daripada orang yang masih bebas di bawah s 170 KPJ. Oleh itu, pihak pendakwaan mempunyai beban untuk membuktikan elemen-elemen kesalahan tersebut terhadap perayu tanpa bergantung kepada keterangan yang berkaitan dengan perlakuan kesalahan tersebut, iaitu orang yang masih bebas itu mengacukan pisau ke arah SP1 (lihat perenggan 24).

(2) Pertuduhan tersebut, merujuk kepada s 392/397 Kanun juga cacat. Tetapi, kecacatan tersebut tidak memudaratkan. Pihak pendakwaan harus membuktikan kesalahan merompak di bawah s 390 Kanun yang boleh dihukum di bawah s 392 dan/atau 397 Kanun. Memandangkan perayu tidak menggunakan pisau atau apa-apa senjata semasa melakukan kesalahan tersebut, seksyen hukuman yang boleh digunapakai ialah s 392 dan bukannya s 397 Kanun. Rujukan kepada s 397 Kanun dalam pertuduhan tidak mengakibatkan kegagalan keadilan. Selagi perayu tidak diprejudiskan dan tahu jenis kesalahan yang dipertuduhkan, rujukan kepada s 397 Kanun dalam pertuduhan tersebut tidak menjadikan prosiding tersebut tidak sah (lihat perenggan 25).

(3) Memandangkan hanya s 393 Kanun yang boleh digunapakai kepada pertuduhan terhadap perayu, elemen yang perlu dibuktikan bagi kesalahan terhadap perayu hanyalah kelakuan merompak tersebut iaitu pencurian telah dilakukan di bawah s 390 Kanun. Pihak pendakwaan berjaya membuktikan elemen kesalahan itu. Pembelaan tidak menimbulkan sebarang keraguan ke atas kes pendakwaan untuk mematahkannya (lihat perenggan 28–29 & 45).

(4) Isi kandungan P1 boleh diterima disebabkan isinya sama dengan keterangan SP1 di mahkamah. Majikan SP1, SP3 juga dipanggil sebagai saksi dan dia mengesahkan bahawa dia hanya membantu SP1 membuat laporan polis kerana SP1 tidak tahu berbahasa Melayu (lihat perenggan 48).

(5) Perayu tidak bersenjata dan tidak mengakibatkan kecederaan pada masa melakukan kesalahan tersebut. Namun begitu, mahkamah harus memberi pengiktirafan kehakiman ke atas fakta bahawa kegiatan meragut oleh peragut atau perompak berleluasa di negara ini, terutamanya di Lembah Klang, termasuklah di Petaling Jaya di mana kejadian tersebut berlaku. Walau bagaimanapun, memandangkan majistret khilaf dari segi fakta dan undang-undang apabila mempertimbangkan fakta bahawa orang yang masih bebas tersebut telah menggunakan pisau ketika perayu melakukan kesalahan tersebut, hukuman penjara lapan bulan tidak berpatutan. Hukuman penjara lapan bulan diketepikan dan digantikan dengan hukuman penjara enam bulan (lihat perenggan 53–55).]

**Notes**

For a case on appeal against conviction and sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 176.
For a case on robbery, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4077.
For cases on defective charge, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1115.
For cases on police report, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1207–1211.

**Cases referred to**

*Azhar bin Che Wil v PP and another appeal* [2009] 6 CLJ 537, CA (refd)
*Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489; [2006] 1 CLJ 857, CA (refd)
*Low Seng Wah v PP* [1962] MLJ 107; [1961] 1 LNS 55, HC (refd)
*Mat v PP* [1963] MLJ 263, HC (refd)
*PP v Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334, HC (refd)
*Tan Chew Man v PP* [1977] 2 MLJ 247, FC (distd)
*Zulkiflee bin Mohd Dom v PP* [1997] 4 MLJ 161; [1997] 3 CLJ Supp 290, HC (refd)

**Legislation referred to**

Criminal Procedure Code ss 156, 170, 170(1), 422
Firearms (Increased Penalties) Act 1971 ss 4, 9
Penal Code ss 34, 390, 392, 397

*Jayananda Rao (Rao & Kamal) for the appellant.*
*Isa bin Hassim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Yeoh Wee Siam JC:**

**[1]** This is an appeal by Gunalan a/l Visuanathan ('the appellant') against his conviction and sentence in the Petaling Jaya Magistrate's Court Arrest Case No M1-83–367 of 2002. The appellant was charged as follows:

> Pertuduhan
>
> Bahawa kamu bersama seorang lagi yang masih bebas pada 19/8/02 jam lebih kurang 10.30 pagi di alamat No 15 Jalan Gasing Petaling Jaya di dalam Daerah Petaling, di dalam Negeri Selangor, telah melakukan samun ke atas Ramalingam Tamilmani P/Port No E 0242095 dengan meragut beg mangsa dan semasa melakukan samun tersebut kamu telah menggunakan senjata pisau yang mana jika digunakan boleh menyebabkan kecederaan atau kematian. Oleh itu kamu telah melakukan satu kesalahan yang bolih dihukum mengikut Seksyen 392/397 Kanun Keseksaan.

**[2]** I heard the appeal on 23 October 2009 after which I gave my decision on the same day.

## EVALUATION OF THE MAGISTRATE'S DECISION

**[3]** The learned magistrate ('the magistrate') held that the prosecution had established a prima facie case based on the following evidence of the prosecution witnesses:

*SP1*: He was the victim and also the complainant.

**[4]** SP1 gave evidence that on 19 August 2002 he was going to the bank on a motorcycle. At the main road, when he stopped his motorcycle, the appellant and his friend came towards SP1 and asked SP1 in Bahasa Melayu 'You punya nama Tamil Mani ke?', and 'You punya motor 8306 ke?'. After that, the appellant's friend pointed a knife and the appellant pulled the bag from SP1.

**[5]** SP1 chased the person who ran away with his bag ie the appellant. SP1 saw the appellant running away towards Jalan Gasing and SP1 chased him for about five minutes.

**[6]** After that, the appellant ran towards the direction of the Sport Toto Shop and Lotus Restaurant and at that time members of the public were successful in detaining the appellant, and the appellant fell.

**[7]** SP1 then was able to get back his bag which was snatched by the appellant and SP1 detained the appellant.

**[8]** The appellant's friend ran away and got into a taxi.

**[9]** Later the police came and arrested the appellant.

**[10]** SP1 also stated that when he chased the appellant, he did see the appellant holding the bag and SP1 was successful in getting back his bag from the appellant after the appellant fell down.

**[11]** Inside the bag was cash of RM50 notes amounting to RM3,000 which were wrapped with a Public Bank slip and tied with a rubber band.

**[12]** SP1 later lodged a police report on the incident.

*SP2*: He was the arresting officer of the police.

**[13]** He came to arrest the appellant after receiving information of the appellant's arrest together with one black bag containing RM50 notes totaling RM3,000.

**[14]** SP2 was able to identify the appellant in court as the person who was handed over to him after SP1 detained him.

**[15]** SP2 also identified the bag and the RM3,000 together with the Public Bank slip.

*SP3*: He was SP1's employer and corroborated SP1's evidence.

**[16]** He stated that since SP1 did not know the Malay language, SP3 assisted SP1 in making his police report (P1).

*SP4*: He was the investigating officer ('IO').

**[17]** He confirmed the evidence of SP1, SP2 and SP3 regarding the appellant's arrest on 19 August 2002 for robbing SP1, and armed with a weapon, of RM3,000 together with another male Indian.

**[18]** SP4 confirmed that he recorded SP1's evidence and received the exhibits from SP3. He also went to the place of the incident. SP4 also stated

A that the appellant's friend managed to run away and could not be located. SP4 identified the appellant in court as the person who was arrested.

SUBMISSIONS OF BOTH PARTIES ON THE CHARGE

B **[19]** Learned counsel raised the following issues:

(a) the public prosecutor failed to include in the charge the provision of s 34 of the Penal Code even though the appellant was charged with another person still at large. This means that the prosecution used s 170 of the CPC to prove its case. The failure to mention s 34 of the Penal Code in the charge has resulted in the prosecution in not being able to prove the case beyond reasonable doubt against the appellant;

(b) s 397 of the Penal Code is an offence which is separate and distinct from the offence under s 392 of the Penal Code (the principle in the Federal Court case of *Tan Chew Man v Public Prosecutor* [1977] 2 MLJ 247 should be adopted); and

(c) due to the failure of the prosecution to cite s 34 of the Penal Code in the charge and the principle in *Tan Chew Man* the decision of the magistrate is a clear misdirection in law. The magistrate had erred in deciding that the prosecution had proved the case beyond reasonable doubt against the appellant.

**[20]** The prosecution, in reply to the above submissions, stated:

(a) the failure to cite s 34 of the Penal Code is not fatal. It is an irregularity which is curable under s 422 of the CPC (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2006] 1 CLJ 857; *Azhar bin Che Wil v Public Prosecutor and another appeal* [2009] 6 CLJ 537; and *Public Prosecutor v Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334);

(b) under s 156 of the CPC any error in stating the particulars required to be stated in a charge, and any omission to state the offence shall not be regarded as material unless the accused was misled by that error or omission (see *Zulkiflee bin Mohd Dom v Public Prosecutor* [1997] 4 MLJ 161; [1997] 3 CLJ Supp 290 and *Low Seng Wah v Public Prosecutor* [1962] MLJ 107; [1961] 1 LNS 55); and

(c) no objection had been taken by the appellant regarding the defect in the charge either at the commencement or in the course of the trial.

**[21]** Section 34 of the Penal Code provides as follows:

> 34 Each of several persons liable for an act done by all, in like manner as if done by him alone

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

**[22]** Section 170(1) of the CPC provides as follows:

170 When persons may be charged jointly

(1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all such charges.

**[23]** Section 422 of the CPC provides as follows:

422 Irregularities not to vitiate proceedings

Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any injury or other proceeding under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence occasioned a failure of justice.

**[24]** After considering the above submissions of both parties I am of the opinion that the charge is defective for failure to include s 34 of the Penal Code. As submitted by the prosecution, it is true that such irregularity is not fatal but is curable under s 422 of the CPC. However, since the evidence shows that the person at large was the one who pointed the knife at SP1, and not the appellant, that fact should not be held against the appellant. The benefit of the failure by the prosecution to state s 34 of the Penal Code should be given to the appellant. Therefore, the appellant should be treated as if he had been charged and tried separately from the person still at large under s 170 of the CPC. That being the case, the prosecution has the burden of proving the ingredients of the offence against the appellant without relying

on the evidence that in the course of the commission of the offence, the person at large pointed a knife at SP1.

**[25]** The charge, by the reference to ss 392/397 of the Penal Code, is also defective. However, I do not think that such defect is fatal. Section 392 of the Penal Code provides that the punishment for robbery is imprisonment for a term which may extend to 14 years and liability to fine or whipping. Section 397 of the Penal Code provides for the additional and enhanced punishment of whipping for the offence of committing robbery when armed or with any attempt to cause death or hurt. What is important here is for the prosecution to prove the offence of robbery under s 390 of the Penal Code which is punishable under s 392 and/or s 397 of the Penal Code. In this case, since the appellant did not use a knife or any weapon during the commission of the offence, it automatically means that the punishment section that is applicable is s 392 and not s 397 of the Penal Code. I do not think that the reference to s 397 of the Penal Code in the charge has occasioned a failure of justice. So long as the appellant is not prejudiced and knows the type of offence that he is charged for, the reference to s 397 of the Penal Code in the charge does not vitiate the proceedings against the appellant (see s 422 of the CPC). Section 397 of the Penal Code is only relevant and material when it comes to deciding the punishment for the offence of armed robbery, and this, which I would deal with later in this judgment, is an important factor that the magistrate has to consider prior to sentencing should the appellant be found guilty and convicted for the offence of robbery. At that stage, the question whether it is robbery under s 390, and punishable under s 392 of the Penal Code, or armed robbery punishable under s 397 of the Penal Code has to be considered.

**[26]** In view of the above position that I have taken, I therefore did not follow the principle in *Tan Chew Man* as submitted by learned counsel for the appellant. In *Tan Chew Man* the appellant (Tan) and another person committed an offence of armed robbery under ss 392/397 of the Penal Code and another offence under ss 4 and 9 of the Firearms (Increased Penalties) Act 1971. The Federal Court allowed the appeal of the appellant and set aside his conviction and sentence on the first charge under ss 392/397 of the Penal Code since at the time of commission of the offence of robbery, the appellant (Tan) was not using any deadly weapon, as stated in the charge. He was merely with another person who used a revolver.

**[27]** I am of the opinion that the present case should be distinguished from *Tan Chew Man*. In the present case, the evidence shows that the appellant, even though he did not point a knife at SP1, he did, however, commit the offence of robbery by snatching SP1's bag. The actual offence of robbery was committed by the appellant, not by the person at large who ran away.

INGREDIENTS OF THE OFFENCE

**[28]** The magistrate did not specifically list down the ingredients of the charge under ss 392/397 of the Penal Code. Based on my earlier ruling that only s 392 of the Penal Code is applicable to the charge against the appellant, in my opinion the only ingredient to be proved for the offence against the appellant is that an act of robbery was committed ie theft was committed under s 390 of the Penal Code.

**[29]** The prosecution was able to prove the above ingredient of the offence. SP1 was clear in his evidence that the appellant snatched the bag containing RM3,000 from SP1's hand ('the bag'). (The fact that the appellant's friend also pointed a knife at SP1 at the time of the committing of the theft need not be proved or be held against the appellant since s 34 of the Penal Code was omitted from the charge by the prosecution). The appellant ran away after committing the offence. After the appellant was chased by SP1, he fell and was detained by members of the public and SP1. The appellant was caught red-handed with the bag. The appellant's accomplice managed to run away and get into a taxi.

**[30]** I am satisfied that the magistrate did not err in fact and law, and he was right in his decision, after a maximum evaluation of the evidence, to hold that the prosecution had proved a prima facie case against the appellant and to call for the defence.

WHETHER THE DEFENCE RAISED ANY REASONABLE DOUBT ON THE PROSECUTION CASE

**[31]** The appellant's defence, given on oath, was that he happened to meet a male person called Ravi on 18 August 2002. Ravi asked the appellant for his help to collect a debt of RM10,000 and if he was successful in collecting the debt, the appellant would be paid 10% of the debt.

**[32]** Later, on 19 August 2002, the appellant was directed by Ravi to go quickly to Pudu Raya. The appellant went there by his motorcycle and left the motorcycle there. He was told by Ravi to get into a taxi. While in the taxi, Ravi informed the appellant that the place they were going to was far away so they had to go by taxi. Ravi also told the appellant that the person who owed him the RM10,000 was a person named Tamil Mani who worked at the Lotus Restaurant.

A **[33]** When they arrived at their destination, the appellant waited in the taxi while Ravi went to use a public telephone at the end of the row of shop houses where the Lotus Restaurant was located.

B **[34]** Ravi told the appellant that Tamil Mani would take that road and they would stop Tamil Mani and ask him for the money.

C **[35]** After about ten minutes, the appellant saw Tamil Mani riding a motorcycle and the appellant went to stop the motorcycle and asked the person whether he was Tamil Mani. The person admitted that he was Tamil Mani.

D **[36]** At that time Ravi pulled Tamil Mani's bag and Tamil Mani fell. The appellant then panicked. Tamil Mani immediately chased Ravi and shouted 'curi, curi' and the appellant was running behind Tamil Mani.

E **[37]** Later the appellant managed to catch up with Ravi and retrieved the bag from Ravi. The appellant wanted to go to the Lotus Restaurant but he heard Tamil Mani screaming 'pencuri, pencuri' and heading towards the appellant.

**[38]** The appellant then put the bag down and sat on the divider of the road, in the middle of the road.

F **[39]** After about two minutes Tamil Mani came towards the appellant and kicked his face and said that the appellant was the one who stole his bag. All the people who were there then arrested the appellant.

G **[40]** Later, the appellant was taken to the police station.

**[41]** The appellant stated that he did not give the police Ravi's address because the police did not ask for it. In any case, the appellant did not know the address because he only got to know Ravi at a disco.

H **[42]** The appellant denied that he was involved in the theft incident and stated that he was only helping to seize the bag back from Ravi.

I **[43]** The magistrate was of the opinion that the appellant's evidence for his defence was only a mere fabrication or concoction by the appellant to avoid the charge. As such, the magistrate rejected the evidence given on oath by the appellant.

**[44]** The magistrate preferred to accept SP1's evidence which was clear in that the appellant's accomplice was the one who pointed the knife at SP1 but the appellant was the one who snatched the bag from SP1. Later, SP1 chased the appellant, and whilst chasing the appellant, SP1 could see that the appellant was holding the bag. SP1 was finally able to retrieve the bag from the appellant's own hands.

**[45]** From the above, I agree fully with the magistrate that the defence has not raised any reasonable doubt on the prosecution case to rebut it. The magistrate did not err in fact or in law in rejecting the appellant's evidence because, to me, the defence sounds hollow. It is highly probable that the appellant made up the story to get away from the charge. It is hard to believe the appellant's defence when SP1's evidence is so clear that SP1 himself gave chase to the appellant after the appellant had snatched the bag from SP1. Finally, SP1 caught the appellant with the bag in the appellant's hand. Therefore, defence is not credible and ought not to be believed or accepted.

**[46]** It is also very obvious that the appellant was trying to push the whole blame onto Ravi.

**[47]** The defence contended that the police report (P1) made by SP1 was not true because SP1 did not understand the Malay language and SP1's employer had to assist SP1 in making P1.

**[48]** I agree with the magistrate that the contents of P1 can be accepted because its contents are similar to SP1's testimony in court. SP1's employer, SP3, was also called as a witness and he confirmed that he only assisted SP1 to make the police report because SP1 did not know the Malay language. In any case, SP1 stated that SP3 did read back to him P1 after it was written. I do not think that there should be any dispute on the accuracy of the contents of P1. In my view, P1 is consistent with SP1's evidence and should be accepted by the court.

**[49]** The defence contended that there was inconsistency in the evidence of SP2 (the arresting officer) and SP4 (the investigating officer) regarding the exhibits of the case. The magistrate considered the contention but ruled that there was no such inconsistency because SP2 stated that he handed over to SP4 the cash of RM3,000 (all in RM50 notes), one black bag and one Public Bank slip. The form for handing over was also signed by SP2 and SP4. Moreover, all the exhibits were identified by SP2 and SP4 in court. Here, I am of the opinion that the magistrate was correct in his evaluation of the evidence of SP2 and SP4 and the exhibits are correct and can be accepted.

**[50]** On the whole, the defence case is hollow and weak and cannot be believed or accepted. The magistrate was right to follow Suffian J's guiding principles in *Mat v Public Prosecutor* [1963] MLJ 263 and, being satisfied beyond reasonable doubt as to the appellant's guilt, convicted the appellant.

**[51]** Accordingly, I upheld the magistrate's order of conviction against the appellant. The appeal of the appellant against his conviction is dismissed.

APPEAL AGAINST SENTENCE

**[52]** The magistrate gave a sentence of eight months imprisonment with effect from the date of sentence ie 6 February 2007. However, the magistrate granted stay of execution.

**[53]** I am of the opinion that such sentence has to be reviewed, bearing in mind that the appellant was not armed or using a knife, or causing hurt or violence, at the time of commission of the offence.

**[54]** Notwithstanding that, I take judicial notice of the fact that bag-snatching by snatch thieves or robbers is rampant in this country, particularly in the Klang Valley, including Petaling Jaya where the offence has been committed. Such crimes are a total menace to society to the extent that our roads are now no longer safe for anyone to walk on or go about their business carrying their bags. It is rather fortunate for the appellant that in this case, SP1, the victim was not injured by the appellant's act of snatching SP1's bag. Had SP1 been injured, then the appellant should be given a heavier sentence. I also take into account the fact that the bag was retrieved by SP1. Therefore no monetary loss was caused to SP1 and his employer. It is also fortunate for the appellant that there is no cross-appeal by the prosecution for enhancement of the sentence. Be that as it may, since the magistrate considered the fact that the person at large used a knife when the appellant committed the offence, and since the magistrate had erred in fact and law in considering that factor, I am satisfied that the eight months imprisonment is inappropriate.

**[55]** Based on the above, I set aside the sentence of eight months imprisonment imposed by the magistrate and substituted it with a sentence of six months imprisonment.

*Appeal against conviction dismissed and appeal against sentence allowed.*

Reported by Kanesh Sundrum